JUDGMENT OF THE COURT (First Chamber)

22 November 2007 *

In Case C-525/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 27 December 2004,

Kingdom of Spain, represented by J.M. Rodríguez Cárcamo, acting as Agent, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by V. Kreuschitz and J. Buendía Sierra, acting as Agents, and by M. Núñez-Müller, Rechtsanwalt, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

Lenzing AG, established in Lenzing (Austria), represented by U. Soltész, Rechtsanwalt,

applicant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), R. Schintgen, A. Borg Barthet and E. Levits, Judges,

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 December 2006,

after hearing the Opinion of the Advocate General at the sitting on 1 February 2007,

gives the following

Judgment

1 By its appeal, the Kingdom of Spain asks the Court to set aside the judgment delivered by the Court of First Instance of the European Communities on 21 October 2004 in Case T-36/99 *Lenzing* v *Commission* [2004] ECR II-3597 ('the judgment under appeal'), by which the Court of First Instance partly annulled

Commission Decision 1999/395/EC of 28 October 1998 on State aid implemented by Spain in favour of Sniace SA, located in Torrelavega, Cantabria (OJ 1999 L 149, p. 40; 'the decision of 28 October 1998'), as amended by Commission Decision 2001/43/EC of 20 September 2000 (OJ 2001 L 11, p. 46; 'the contested decision').

Facts

2 In paragraphs 8 to 29 of the judgment under appeal, the Court of First Instance set out the facts of the dispute as follows:

'8 Lenzing AG ["Lenzing"] is an Austrian company which produces and markets cellulose fibres (viscose, modal and lyocell).

9 Sniace SA ("Sniace") is a Spanish company which produces cellulose, paper, viscose fibres, synthetic fibres and sodium sulphate. ...

10 In March 1993, the Spanish courts ordered suspension of payments by Sniace, which had been in financial difficulties for several years. In October 1996, Sniace's private creditors agreed to convert 40% of their debts into shares in that company; this agreement led to the lifting of the order suspending payments. Sniace's public creditors used their right of abstention and decided not to take part in that agreement.

11 On 5 November 1993 and 31 October 1995, Sniace and Fogasa [the Spanish wages guarantee fund] concluded agreements relating to the repayment to Fogasa of the arrears in wages and compensation which it had paid to Sniace's workers. The first agreement provided for repayment of the sum of ESP 897 652 789 plus interest of ESP 465 055 911 calculated at the statutory rate of 10%, in six-monthly instalments payable over eight years ("the agreement of 5 November 1993"). The second agreement provided for repayment of the sum of ESP 229 424 860, plus interest of ESP 110 035 018 calculated at the statutory rate of 9%, in six-monthly instalments payable over eight years ("the agreement of 31 October 1995"). On 10 August 1995, in order to guarantee the debts owing to Fogasa, Sniace granted a mortgage over two of its properties. The amount repaid by Sniace under those two agreements came to ESP 186 963 594 as at June 1998.

12 On 8 March 1996, the General Social Security Fund ("the Social Security Fund") concluded an agreement with Sniace with a view to rescheduling the latter's debts in respect of social security contributions amounting to ESP 2 903 381 848 for the period February 1991 to February 1995 ("the agreement of 8 March 1996"). That agreement provided for repayment of that amount, plus interest at the statutory rate of 9%, in 96 monthly instalments over a period ending in March 2004. It was amended by an agreement of 7 May 1996, under which repayment was to be deferred for one year and then to be made in 84 monthly instalments together with interest at the statutory rate of 9% ("the agreement of 7 May 1996"). Sniace failed to honour those agreements, which were therefore replaced by a new agreement concluded on 30 September 1997 between Sniace and the Social Security Fund ("the agreement of 30 September 1997"). The amount to be repaid came to ESP 3 510 387 323, corresponding to arrears of social security contributions for the period February 1991 to February 1997, plus default charges of ESP 615 056 349, and was to be made over 10 years. During the first two years, only the interest, calculated at an annual rate of 7.5%, was payable, while in subsequent years repayments were to cover both principal and interest. By April 1998, Sniace had repaid ESP 216 118 863 under the agreement of 30 September 1997.

13 On 4 July 1996 [Lenzing] lodged a complaint with the Commission concerning a number of instances of State aid which it alleged had been granted to Sniace over several years beginning in the late 1980s. It sent further information to the Commission by letters of 26 November and 9 December 1996. The Spanish authorities submitted observations by letter of 17 February 1997.

...

16 By letter of 7 November 1997, the Commission informed the Spanish Government that it had decided to open the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC) in respect of certain of the alleged aid of which [Lenzing] complained, including the agreements of 5 November 1993 and 31 October 1995 and the "non-recovery of social security contributions since 1991", and invited it to submit its observations. The other Member States and interested parties were informed of the opening of that procedure and were invited to submit any observations which they might have when that letter was published in the *Official Journal of the European Communities* of 14 February 1998 (OJ 1998 C 49, p. 2). The Spanish Government communicated its observations by letter of 19 December 1997. Certain interested parties, including [Lenzing] by letter of 27 March 1998, submitted their observations, on which the Spanish Government commented by letter of 24 June 1998. By letter of 16 April 1998, the Spanish Government answered certain questions put by the Commission by letter of 23 February 1997.

17 On 28 October 1998, the Commission adopted [the decision of 28 October 1998].

18 The operative part of that decision reads as follows:

"*Article 1*

The following State aid which Spain has granted to [Sniace] is incompatible with the common market:

(a) in so far as the rate of interest was below market rates, the agreement [of] 8 March 1996 (as amended by [the] agreement of 7 May 1996) between Sniace and the Social Security Fund to reschedule debts covering ESP 2 903 381 848 in principal, as further amended by agreement of 30 September 1997 to reschedule debts covering ESP 3 510 387 323 in principal; and

(b) in so far as the rate of interest was below market rates, the agreements of 5 November 1993 and 31 October 1995 between Sniace and ... Fogasa covering ESP 1 362 708 700 and ESP 339 459 878 respectively (including interest).

As regards the other matters that were the subject of the proceedings opened pursuant to Article [88(2) EC], namely a loan guarantee ... totalling ESP 1 billion approved by Law No 7/93, the financing arrangements for the planned construction of a waste treatment plant and the partial cancellation of debts by the Torrelavega City Council, these measures do not constitute aid and the procedure can be closed. ... As regards the unpaid environmental levies during the period 1987 to 1995, the Commission will take a separate decision in due course.

Article 2

1. The Kingdom of Spain shall take the necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to it.

..."

19 By application lodged at the Court Registry on 24 December 1998, the Kingdom of Spain brought an action for annulment of the decision of 28 October 1998 (Case C-479/98). The proceedings in that case were suspended, by decision of the President of the Court of Justice of 23 February 1999, pending delivery of the judgment of the Court of Justice in Case C-342/96 *Spain* v *Commission*, which raised similar issues.

...

21 On 29 April 1999, the Court of Justice delivered its judgment in Case C-342/96 ([1999] ECR I-2459; "the *Tubacex* judgment"). It first of all stated that Fogasa did not award loans to undertakings in liquidation or in difficulties, but settled all valid claims put forward by employees with money which it paid and then recovered from the undertakings. It further stated that Fogasa might conclude repayment agreements enabling it to reschedule the sums payable or to make them payable by instalments and that the Social Security Fund might likewise agree to rescheduling the payment of debts in respect of social security contributions or to their payment by instalments. The Court then noted that the State had not acted as a public investor whose conduct must be compared to the

conduct of a private investor laying out capital with a view to realising a profit in the relatively short term, but as "a public creditor which, like a private creditor, seeks to recover sums due to it and which, to that end, concludes agreements with the debtor, under which the accumulated debts are to be rescheduled or paid by instalments in order to facilitate their repayment" (paragraph 46). It stated that the agreements in question had been concluded on account of the fact that Tubacex had already been subject to the pre-existing statutory obligation to repay the wages advanced by Fogasa and to pay its debts in respect of social security contributions and that the agreements had not therefore created any new debts owed by Tubacex to the public authorities (paragraph 47). Last, the Court held that "[t]he interest normally applicable to that type of debt is intended to make good the loss suffered by the creditor because of the debtor's delay in performing its obligation to pay off its debt, namely default interest" and that "[i]f the rate of default interest applied to the debts of a public creditor is not the same as the rate charged for the debts owed to a private creditor, it is the latter rate which ought to be charged if it is higher than the former" (paragraph 48). In the light of those factors, the Court annulled Decision 97/21 "in so far as it declares incompatible with Article [87 EC] the measures adopted by the Kingdom of Spain in favour of [Tubacex], inasmuch as the interest rate of 9% charged on the sums owed by the latter to [Fogasa] and to the Social Security Fund is lower than the prevailing market rates".

...

23 Following the *Tubacex* judgment, the Commission reconsidered the decision of 28 October 1998. By letter of 16 February 2000, it informed the Spanish Government of its decision to reopen the procedure provided for in Article 88(2) EC in respect of the "elements of aid ... deemed incompatible with the common market set out in Article 1 of the decision [of 28 October 1998]" and invited it to submit its comments. ...

24 On 20 September 2000, the Commission adopted [the contested decision].

...

26 [In that decision], the Commission concluded ... that "the repayment agreements between Fogosa and Sniace and the debt rescheduling agreement between the Social Security Treasury and Sniace [did] not constitute State aid" (recital 31) and that "it [was] appropriate to amend [the decision of 28 October 1998]" (recital 32).

27 The operative part of [the contested decision] provides:

"*Article 1*

The decision [of 28 October 1998] is hereby amended as follows:

(1) The first subparagraph of Article 1 is replaced by the following:

'The following measures which Spain has implemented in favour of [Sniace] do not constitute State aid:

(a) the agreement of 8 March 1996 (as amended by the agreement of 7 May 1996) between Sniace and the Social Security [Fund] to reschedule debts covering ESP 2 903 381 848 (EUR 17 449 676.34) in principal, as further

amended by the agreement of 30 September 1997 to reschedule debts covering ESP 3 510 387 323 (EUR 21 097 852.72) in principal;

(b) the agreements of 5 November 1993 and 31 October 1995 between Sniace and [Fogasa] covering ESP 1 362 708 700 (EUR 8 190 044.23) and ESP 339 459 878 (EUR 2 040 194.96) respectively.'

(2) Article 2 is revoked.

..."

...

29 By order of 4 December 2000, the President of the Court of Justice ordered that Case C-479/98 be removed from the Register of the Court.'

The proceedings before the Court of First Instance and the judgment under appeal

3 By application lodged at the Registry of the Court of First Instance on 11 February 1999, Lenzing brought an action for partial annulment of the decision of 28 October 1998. Following the Commission's adoption of the contested decision, Lenzing submitted its comments by letter registered at the Registry of the Court of First

Instance on 12 February 2001, in which it, inter alia, amended the form of order sought so as to ask the Court of First Instance to annul Article 1 of the contested decision in so far as it provides that the non-recovery of debts, penalty charges and interest owing to the Social Security Fund, the agreements of 8 March 1996, 7 May 1996 and 30 September 1997, the non-recovery of debts and default interest owed to Fogasa, and the agreements of 5 November 1993 and 31 October 1995, do not constitute State aid within the meaning of Article 87(1) EC.

4 By the judgment under appeal, the Court of First Instance first of all dismissed the objection of inadmissibility put forward by the Kingdom of Spain and the Commission, concluding, inter alia, that Lenzing had to be regarded as being individually concerned by the contested decision.

5 In paragraph 73 of the judgment under appeal, the Court of First Instance recalled the well-established case-law of the Court of Justice, according to which persons other than those to whom a decision is addressed may claim to be individually concerned only where that decision affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person to whom such a decision is addressed.

6 It went on to state in paragraph 74 of the judgment under appeal that, as regards more particularly the field of State aid, not only the undertaking in receipt of the aid but also the undertakings competing with it which have played an active role in the formal procedure opened pursuant to Article 88(2) EC in respect of an individual aid ('the formal procedure') have been recognised as being individually concerned by the Commission decision closing that procedure, provided that their position on the market is substantially affected by the aid which is the subject of the contested decision (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 25).

7 First, as regards Lenzing's participation in the formal procedure, the Court of First Instance found, in paragraphs 77 to 79 of the judgment under appeal, that Lenzing was at the origin of the complaint which led to the opening of the procedure, and had participated actively in it by submitting detailed comments.

8 Second, as regards the adverse effect on Lenzing's competitive position, the Court of First Instance noted in paragraph 80 of its judgment that, when it is considering whether the application is admissible, it is sufficient for the applicant to adduce pertinent reasons to show that the Commission's decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question.

9 The Court of First Instance went on to examine, in paragraphs 81 to 91 of the judgment under appeal, the arguments put forward by Lenzing to demonstrate the adverse effect on its position on the market. Those paragraphs are worded as follows:

'81 In the present case, the Court finds that in the application [Lenzing] emphasised the fact that the alleged aid had adversely affected its competitive position on the viscose fibres market in that it had allowed Sniace to keep itself artificially in activity when that market is distinguished by a very small number of producers, keen competition and serious overcapacity.

82 In order to demonstrate the existence of that overcapacity, [Lenzing] made express reference to certain pages of the comments which it had submitted on 27 March 1998 following the opening of [the formal procedure] and which are annexed to the application. Those pages contain data on consumption, production and production capacity of viscose fibres in the Community for 1992 to 1997, issued by the Comité international de la rayonne et des fibres synthétiques (CIRFS).

83 At the hearing, moreover, [Lenzing] referred to certain information in its complaint of 4 July 1996, also annexed to the application. In that complaint, it provided information about the viscose fibres market, identified the producers of viscose then present on the market, giving an estimate of their respective production capacities, and provided details of the quantities of viscose fibres sold by Sniace for the years 1991 to 1995, distinguishing in particular the quantities sold in Spain from those exported to Italy.

84 The Commission has adduced no evidence such as would cast doubt on the accuracy of the information supplied by [Lenzing]. On the contrary, it recognises, both in its objection of inadmissibility and in the decision of 28 October 1998, that the viscose fibres market suffered from overcapacity. Thus, at recital 74 to that decision, it expressly states that "Sniace operates in a sector in decline, which has resulted in rationalisations in capacity being made by some of its competitors", that "[p]roduction in the [European Economic Area] of these fibres declined from 760 000 tonnes in 1992 to 684 000 tonnes in 1997 (a reduction of 10%) and consumption fell in the same period by 11%" and that "[t]he average capacity utilisation rate in that period was about 84%, which is low for such a capital-intensive sector".

85 It should further be noted that the Commission recognised, both in the decision of 28 October 1998 (recital 80) and in the [contested decision] (recital 29), that the serious financial difficulties encountered by Sniace had seriously jeopardised its prospects of survival and that if the Social Security Fund had proceeded to enforce its claims, that could have resulted in the closure of the company. In view of the very small number of producers on the market and the production overcapacity on that market, Sniace's disappearance might have had appreciable effects on the competitive position of the remaining producers in the form of a reduction in their surplus capacity and an improvement in their commercial situation. Although Sniace was admittedly not one of the largest viscose fibre producers in the Community, its position on the market was by no means

insignificant. Accordingly, it must be noted particularly that the Commission stated at recital 9 to the decision of 28 October 1998 that Sniace's viscose fibres production capacity was "approximately 32 000 tonnes (about 9% of Community capacity)".

86 The Court finds that these are factors such as would show that [Lenzing]'s position on the market is substantially affected by the contested decision.

87 In addition, [Lenzing] emphasised that the alleged aid had allowed Sniace to sell its products, in the Community, at prices approximately 20% lower than the average prices of its competitors. In support of that assertion, [Lenzing] referred to the statements of Courtauld plc and Säteri, referred to at recitals 15 and 17 to the decision of 28 October 1998. In its reply, it provided further support for that assertion in the form of an express reference to its letter of 18 June 1997, annexed to the application, in which it had supplied the Commission with further information on the European viscose fibres market. That letter contains tables indicating, in particular, for the years 1989 to 1996, the quantities of viscose fibres and modal delivered by Sniace and [Lenzing] in Spain and also by Sniace and the Austrian producers in France and Italy. That letter also contains information on import prices applied in France and Italy by Sniace and other producers between 1989 and 1996. [Lenzing] also annexed to its reply tables giving the same information for the years 1997 to mid-2001. It follows from those various items that in most cases, and with the exception of producers from the countries of Eastern Europe, Sniace's prices were lower than those of other European producers.

88 The Commission does not dispute that Sniace sold its products at lower prices than its European competitors. It states only that the general fall in prices, of more than 30%, observed on the market between 1990 and 1996 is not a consequence of the alleged aid granted to Sniace but of external factors,

including imports from Asia. According to the specialist publication *European Chemical News*, moreover, which the Commission annexed to its objection of inadmissibility, "market observers say [that] Sniace continues to exert a negative influence on pricing in excess of its small market position capacity".

89 Thus, it cannot be precluded that the alleged aid, some of which was described by the Commission itself as an "appreciable advantage" (recital 80 to the decision of 28 October 1998), allowed Sniace to sell its products at lower prices than its competitors, including [Lenzing].

90 Last, the Commission's argument based on the fact that the applicant had good results and increased its production during the years in question is wholly irrelevant. The fact that its position on the market is substantially affected does not necessarily mean that its profitability falls, that its market share is reduced or that operating losses are incurred. The question in that connection is whether [Lenzing] would be in a more favourable situation in the absence of the decision which it seeks to have annulled. As [Lenzing] rightly states, that may validly cover the situation in which it loses the opportunity to make a profit because the public authorities confer an advantage on one of its competitors.

91 It follows from the foregoing considerations that [Lenzing] properly showed the reasons why the contested decision was liable to harm its legitimate interests by substantially affecting its position on the market. The Court therefore holds that the applicant is individually concerned by the contested decision.'

10 As to the substance of the case, the Court of First Instance accepted Lenzing's plea that the Commission had infringed Article 87(1) EC, inasmuch as it had incorrectly applied the private creditor test.

11 According to the Court of First Instance, the Commission made a manifest error of assessment when it held that the conduct of the Social Security Fund and Fogasa of which Lenzing had complained satisfied the private creditor test. The Court's reasoning in regard to that aspect is set out as follows in paragraphs 154 to 160 of the judgment under appeal:

'154 It follows from the contested decision and from the Commission's written pleadings that there are three reasons why the Commission considers that the Social Security Fund and Fogasa acted like a private creditor in the present case.

155 First, the Commission draws a comparison between the conduct of those bodies and that of Sniace's private creditors. It bases its argument principally on the fact that the Social Security Fund and Fogasa, using their right of abstention, did not participate in the agreement of October 1996 and that, accordingly, they, unlike those private creditors, did not effectively waive 40% of the debts owed to them. ...

156 That first comparison is manifestly incorrect. The Social Security Fund and Fogasa were in a different situation from that of Sniace's private creditors. They enjoyed a right of abstention, their debts are preferential debts and they have certain guarantees, namely securities in the case of the Social Security Fund and a mortgage in Fogasa's case. ...

157 Second, the Commission refers to the fact that Banesto did not enforce the debts owed to it although they were guaranteed by a mortgage ... .

158 This second comparison is clearly no more convincing than the first. There is nothing in the case-file from which it might be assumed that Banesto was in a situation comparable to that of the Social Security Fund and Fogasa. In that regard, it should be noted that the case-file does not contain even a brief indication of the circumstances in which Banesto decided not to enforce payment of the debts owed to it. ...

159 Third, the Commission claims that by concluding the rescheduling and repayment agreements in question, the Social Security Fund and Fogasa were "seeking to maximise the recovery of the sums due to [them] without suffering any financial loss" (recital 30 to the [contested decision]). At recital 29 to the [contested decision], referring to the decision of 28 October 1998, the Commission states, in respect of the Social Security Fund, that "by not proceeding to execution and thereby possibly provoking the liquidation of the company, [that body] acted in such a way as to maximise its prospects of recovering the debt".

160 Those assertions are not substantiated. First, they directly contradict the Commission's repeated allegation that the Social Security Fund and Fogasa were preferential creditors and had sufficient securities, so that there was no incentive to enforce their debts. Second, the Commission did not have sufficient information to be in a position to assess, in full knowledge of the facts, Sniace's prospects of future profitability and viability. Thus, when invited by the Court, by way of the measures of organisation of procedure ..., to communicate developments in the results (turnover and profits or losses) and the volume of Sniace's indebtedness between 1991 and 2000, the Kingdom of Spain admitted

that it did not have those figures. In those circumstances, no reliance can be placed in the Commission's assertion that "the Spanish Government ... gave the defendant a credible assurance that the social security had acted ... with the aim of protecting all the rights which it held over Sniace". What is more, the Commission had been given no credible and realistic restructuring plan for Sniace. ...'

12 Accordingly, in paragraph 162 of the judgment under appeal, the Court of First Instance declared the first ground of appeal to be well founded and therefore annulled Article 1(1) of the contested decision, without considering it necessary to examine the second plea put forward by Lenzing.

Forms of order sought by the parties

13 In its appeal, the Kingdom of Spain claims that the Court should:

— set aside the judgment under appeal;

— grant the form of order which it sought at first instance and accordingly dismiss the action as inadmissible, or, in the alternative, as unfounded; and

— order Lenzing to pay the costs of the appeal.

14 The Commission claims that the Court should:

— set aside the judgment under appeal;

— grant the form of order which it sought at first instance; and

— order Lenzing to pay the costs of the appeal.

15 Lenzing contends that the Court should:

— dismiss the appeal;

— grant the form of order which Lenzing sought at first instance; and

— order the Kingdom of Spain to pay the costs of the appeal and the Commission to pay the costs of the proceedings at first instance.

Appeal

16 The Kingdom of Spain relies on two pleas in law in support of its appeal. The first plea concerns the admissibility of the action which Lenzing brought at first instance, while the second alleges misinterpretation by the Court of First Instance of the private creditor test.

First ground of appeal

Arguments of the parties

17 By its first ground of appeal, the Kingdom of Spain, supported by the Commission, submits that the Court of First Instance erred in law in finding that Lenzing was individually concerned by the contested decision within the meaning of the fourth paragraph of Article 230 EC.

18 First of all, the Spanish Government claims, with reference in particular to *Cofaz and Others* v *Commission*, that, contrary to the requirements laid down in Community case-law, the Court of First Instance reached that conclusion solely on the basis of the role played by Lenzing during the formal procedure, without considering, or at least by incorrectly considering, whether Lenzing's position on the market had been substantially affected by the contested decision.

19 In that regard, the Spanish authorities observe that the measures taken by Fogasa and the Social Security Fund with respect to Sniace, a small operator with a market share of approximately 10%, were unlikely to result in any loss to Lenzing, a company belonging to a group that is one of the main Community producers of viscose fibres. In fact, both Lenzing's market share and its profits rose during the period in question.

20 According to the appellant, however, the Court of First Instance disregarded those factors, or regarded them as irrelevant, and took account instead of circumstances which do not differentiate Lenzing's position on the market, but only that of Sniace, such as Sniace's survival as a result of the support measures in question, or its

pricing. The Court of First Instance thus rendered meaningless the requirement laid down in case-law of an effective and genuine adverse effect on the competitive position of the complainant company.

21 The Spanish Government goes on to complain that the Court of First Instance essentially based its reasoning on Lenzing's alleged loss of opportunity to make a profit as a result of Sniace being kept on the market. However, even on the assumption that Lenzing did in fact lose such an opportunity to make a profit, that in itself cannot mean that the condition as to a substantial adverse effect on the position of the interested party on the market has been satisfied. Furthermore, the requirement of such adverse effect precludes the presumption, applied by the Court of First Instance, of the loss of an opportunity to make a profit.

22 In any event, according to the Spanish authorities, Lenzing did not lose an opportunity to make a profit, as the improvement in the company's overall situation during the period concerned shows. The authorities observe, lastly, that the measures in question resulted not in a supply of funds to Sniace but in agreements for the repayment of debts with interest, which involved a new financial burden for that company. It cannot therefore be asserted that, without those measures, Sniace's competitors would necessarily have found themselves in a better position.

23 The Commission adds that Community case-law shows that it is for the complainant competitor to adduce pertinent evidence of the negative repercussions actually and personally suffered as a result of the aid being granted, and of the extent of the adverse effect on its position on the market. However, the Court of First Instance disregarded those requirements as to the burden of proof of such an adverse effect by taking only general details of the market and of the effects felt by other competitors as a basis for ruling that Lenzing was individually concerned by the contested decision. Moreover, despite being invited to do so on more than one

occasion, Lenzing was unable to put forward in the proceedings at first instance a single example of losses suffered as a result of the aid in question, whereas its performance showed continuous and substantial improvement during the period concerned.

24 By contrast, Lenzing takes the view that the Court of First Instance correctly held that it was individually concerned by the contested decision. In accordance with the requirements laid down in Community case-law, Lenzing provided detailed and convincing proof of the substantial adverse effect on its position on the market in the light of factors such as Sniace's market share, its continuation in business in a market distinguished by overcapacity and few competitors, and Sniace's artificially low pricing. Lenzing claims that it is wrong therefore to assert in that regard that the Court of First Instance took as its basis only the alleged loss of opportunity to make a profit. That factor is, in any case, entirely relevant to the analysis of the adverse effect on Lenzing's competitive position, since Lenzing would undoubtedly have been in a more favourable position if a competitor had disappeared in a market such as that at issue here. The remaining companies would have been able to acquire the market shares thus made available and to utilise their overcapacity.

25 A number of circumstances attest to a real adverse effect on Lenzing's competitive position: the direct competition which exists between the two companies in the same geographical markets and in respect of the same customers, Sniace's acquisition of new market shares during the period concerned, the fact that the measure in question constitutes operating aid with particularly restrictive effects on competition, and also the costs incurred by Lenzing and its efforts in relation to the formal procedure.

26 Lenzing states, further, that the Kingdom of Spain and the Commission based their arguments on an excessively narrow interpretation of Community case-law and, in particular, of the judgment in *Cofaz and Others* v *Commission*. In fact that case-law

simply requires the complainant competitor to prove that its position on the market 'may' be affected by the State aid and therefore does not require an 'effective and genuine' adverse effect to be demonstrated, which would be too onerous a burden of proof for the aid recipient's competitors.

27 Finally, in its reply, the Commission painted an excessively positive picture of Lenzing's economic situation during the period concerned in order to minimise the effects of the aid in question. That picture is, moreover, contradicted by certain information in the documents which the Commission itself used in the proceedings at first instance.

Findings of the Court

28 By its first ground of appeal, the Kingdom of Spain, supported by the Commission, claims, in essence, that the factors which the Court of First Instance regarded as showing a substantial adverse effect on Lenzing's position on the market are insufficient proof that such an adverse effect really existed.

29 As a preliminary point, it must be noted that, according to the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to the former.

30 According to the settled case-law of the Court, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason

of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed (see, in particular, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 20; and Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33).

31 With regard more particularly to the field of State aid, persons other than those to whom a decision is addressed who call in question the merits of a decision appraising the aid are regarded as being individually concerned by that decision where their position on the market is substantially affected by the aid which is the subject of the decision in question (see, to that effect, *Cofaz and Others* v *Commission*, paragraphs 22 to 25, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraphs 37 and 70).

32 As regards establishing such an effect, the Court has had occasion to clarify that the mere fact that a measure such as the contested decision may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned was in a competitive relationship with the addressee of that measure cannot in any event suffice for that undertaking to be regarded as individually concerned by that measure (see, to that effect, Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459, paragraph 7, and order of 21 February 2006 in Case C-367/04 P *Deutsche Post and DHL Express* v *Commission*, not published in the ECR, paragraph 40).

33 Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 41, and order in *Deutsche Post and DHL Express* v *Commission*, paragraph 41).

34 However, contrary to the claims of the Kingdom of Spain and the Commission, it does not follow from the case-law of the Court that a particular position of this kind, which distinguishes a person other than the persons addressed, within the meaning of *Plaumann* v *Commission*, from any other economic operator, has to be inferred from factors such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question.

35 As the Advocate General noted in points 43 to 45 of her Opinion, the grant of State aid can have an adverse effect on the competitive situation of an operator in other ways too, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid. Similarly, the seriousness of such an effect may vary according to a large number of factors such as, in particular, the structure of the market concerned or the nature of the aid in question. Demonstrating a substantial adverse effect on a competitor's position on the market cannot, therefore, simply be a matter of the existence of certain factors indicating a decline in its commercial or financial performance.

36 Moreover, it cannot be ruled out that an undertaking will succeed in avoiding or at least limiting such a decline in some circumstances, for example, by making savings or by expanding in more profitable markets. However, if upheld, the arguments of the Spanish authorities and of the Commission would result in the fourth paragraph of Article 230 EC being interpreted in such a way that, in those circumstances, despite suffering substantial repercussions from the grant of State aid to a competitor, an undertaking might find that it was not credited as having legal standing to bring proceedings against a decision relating to an assessment of the aid in question.

37 In the present case, it is apparent from paragraphs 81 to 90 of the judgment under appeal that the Court of First Instance did not merely note in general terms that Lenzing and Sniace were in competition with each other, but based its findings as to

the adverse effect on Lenzing's position on the market on a number of factors adduced by the latter to show in essence the distinctiveness of the competitive situation of the viscose fibres market, which was characterised by a very small number of producers and by serious production overcapacity, the significance of the distortion created by the grant of aid to an undertaking operating in such a market, and the effect of that aid on the prices applied by Sniace.

38 In particular, for the reasons which the Advocate General set out in points 45 and 46 of her Opinion, the Court of First Instance was entitled to conclude, in paragraph 85 of the judgment under appeal, that keeping an operator in business in a market displaying the characteristics of the viscose market, characteristics which the Spanish Government did not dispute, might have appreciable effects on the position of its competitors.

39 In particular, therefore, Lenzing's situation can be clearly distinguished from that at issue in *Commission* v *Aktionsgemeinschaft Recht und Eigentum* (paragraph 72), in which the Court held that there was no substantial adverse effect on the competitive position of the members of the applicant association in that case, owing to the fact that a very large number of operators, namely all the farmers in the European Union, could be regarded as competitors of the beneficiaries of the land acquisition scheme in question.

40 Furthermore, it must be noted that the Kingdom of Spain and the Commission have not provided the Court of Justice with any evidence to show any distortion of the evidence submitted to the Court of First Instance or any inaccuracy in the findings of the Court of First Instance with regard to the documents in the case-file which could call in question its unfettered assessment of the facts as to the adverse effect on Lenzing's position on the market.

41 Finally, the Court of First Instance cannot in those circumstances be criticised for, as the Commission claims, disregarding the rules on allocation of the burden of proof. In that regard, it is sufficient to note that, in paragraph 80 of the judgment under appeal, the Court of First Instance held, in accordance with the requirements laid down in *Cofaz and Others* v *Commission* (paragraph 28), that it is for Lenzing alone to adduce pertinent reasons to show that the Commission's decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question. For the reasons set out in paragraphs 34 to 39 of this judgment, the factors relied on by Lenzing and examined by the Court of First Instance showed that there was such an adverse effect.

42 Having regard to the foregoing considerations, the first ground of appeal must be dismissed as unfounded.

Second ground of appeal

Arguments of the parties

43 By its second ground of appeal, the Kingdom of Spain submits that the Court of First Instance erred in law by misinterpreting the private creditor test.

44 It submits that it was incorrectly held in the judgment under appeal, first, that allowing a rescheduling of debts is in itself precluded by the private creditor test and, second, that, in the event of a failure to honour a rescheduling agreement, a private creditor would necessarily always opt for enforcement of his debts. That approach is

contrary to the case-law and, in particular, to the judgments of the Court of Justice in *Tubacex* and of the Court of First Instance in Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, which expressly acknowledged that measures for rescheduling the payment of debts or even for the remission of debts can be perfectly compatible with the private creditor test.

45 In that regard, the Kingdom of Spain states that the examination of such measures should always be carried out on the basis of the particular circumstances of each case. However, the Court of First Instance failed to take into account a whole series of factors which show that the decision taken by the two Spanish public bodies in relation to the recovery of their debts was appropriate and consistent with the conduct of a private creditor. The Kingdom of Spain refers, in particular, to the fact that Sniace's liquidation on account of any enforcement of debts would have created new debts owed to Fogasa in respect of the payment of wages and other compensation to redundant workers, that the sums due were adequately guaranteed and accumulating interest at the statutory rate, that Sniace had already repaid some of its debts and had not incurred others, and that the other creditors had not enforced their debts.

46 Next, the Kingdom of Spain complains of contradictory reasoning of the Court of First Instance in paragraph 146 of the judgment under appeal, on the one hand, in accepting that Fogasa's intervention — provided for in Community legislation on the protection of workers in the event of the employer's insolvency — does not in itself involve elements of State aid, and, on the other, in stating that any public intervention intended to finance an undertaking's operating costs, such as the payment of wages, is liable to constitute aid whenever it has the consequence of conferring an advantage on an undertaking. On this view, the intervention of Fogasa, whose task is precisely to assume responsibility for the payment of wages of employees in undertakings experiencing economic difficulties, would always constitute an advantage for the undertaking concerned.

47 The Commission, which endorses the arguments put forward by the Kingdom of Spain, adds that, by criticising the analysis in the contested decision, the Court of First Instance failed to respect the Commission's broad discretion in relation to complex economic issues. That discretion is subject to only a restricted judicial review, which is limited to manifest errors of assessment.

48 Having regard, first, to the guarantees held by Fogasa and the Social Security Fund and, second, to the conduct of the private creditors, the Commission's refusal to view the contested measures as being State aid was not in any event manifestly erroneous. The Court of First Instance, however, exceeded the limits of its review and substituted its own assessment for that of the Commission, in breach not only of Article 87(1) EC, but also of the principle of institutional balance between the executive and judicial powers of the Community under the EC Treaty.

49 The Commission criticises the Court of First Instance also for failing, in its review of the application of the private creditor test, to examine separately, first, the conclusion by Fogasa and the Social Security Fund of debt-postponement and debt-rescheduling agreements and, second, the non-enforcement of debts where those agreements were not honoured. There is a clear difference, so far as a creditor who acts in accordance with market economy rules is concerned, between entering into a rescheduling agreement and knowing which steps should be taken, if appropriate, in the event of a debtor's breach of that type of agreement.

50 While entirely endorsing the reasoning of the Court of First Instance, Lenzing submits that a number of arguments put forward by the Kingdom of Spain and the Commission are inadmissible in so far as they merely repeat the arguments advanced at first instance or are limited to disputing the assessment of facts or evidence made by the Court of First Instance.

Findings of the Court

51 It must be stated at the outset that the arguments advanced by the Kingdom of Spain and the Commission in relation to the second ground of appeal presuppose that the Court of First Instance found, in the judgment under appeal, that the conclusion of debt-rescheduling agreements and the non-enforcement of debts following the breach of those agreements could never satisfy the private creditor test.

52 However, that argument is based on a misreading of the relevant passages of the judgment.

53 In fact, paragraphs 152 to 161 of the judgment under appeal clearly show that, contrary to the submissions made by the Spanish Government and the Commission, the Court of First Instance did not base its assessment of the measures in question on any illegality *per se* of the debt-rescheduling and debt-repayment agreements or on the presumption that, if those agreements were not honoured, any private creditor would necessarily initiate enforcement procedures in order to recover the debts owed to him. On the contrary, it follows from the above paragraphs that the Court of First Instance concluded that the Commission made a manifest error of assessment, in the light of a series of factors and circumstances peculiar to the case in point.

54 Accordingly, the majority of the arguments advanced by the Spanish Government and the Commission, in reality, call in question the assessment of the evidence made by the Court of First Instance and complain that it failed to take into consideration certain factors which they regard as relevant or took into account other factors which they consider to be irrelevant. However, such an assessment is subject to review by the Court of Justice only where the facts and evidence put before the Court of First Instance have been distorted, and no distortion has been substantiated or alleged by the Spanish Government in the present case (see to that effect, in

particular, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 49; and Case C-206/04 P *Mülhens* v *OHIM* [2006] ECR I-2717, paragraph 28).

55 It follows that this plea is inadmissible in so far as it is directed against the assessment of the evidence by the Court of First Instance.

56 As regards the argument that the Court of First Instance exceeded the limits of its power of review established by case-law in an area giving rise to complex economic assessments, it must be borne in mind, first of all, that, whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39).

57 According to the case-law of the Court of Justice, not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, Case 98/78 *Racke* [1979] ECR 69, paragraph 5; Case C-16/90 *Nölle* [1991] ECR I-5163, paragraph 12; *Commission* v *Tetra Laval*, paragraph 39; and Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 76). However, when conducting such a review, the Community judicature must not substitute its own economic assessment for that of the Commission (order in Case C-323/00 P *DSG Dradenauer Stahlgesellschaft* v *Commission* [2002] ECR I-3919, paragraph 43).

58 Moreover, it must be noted that, where a Community institution has a wide discretion, the review of observance of certain procedural guarantees is of fundamental importance. Thus, the Court of Justice has had occasion to specify that those guarantees include the obligation for the competent institution to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (see Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraph 26).

59 As far as the present case is concerned, it is common ground that the Commission makes a complex economic assessment when it examines whether particular measures can be described as State aid because the public authorities did not act in the same way as a private creditor.

60 As regards the review by the Court of First Instance of that examination, it is apparent from paragraphs 154 to 160 of the judgment under appeal that the Court of First Instance did not substitute its own economic assessment for that of the Commission, but confined itself to noting, first, a number of obvious contradictions, apparent from the text of the contested decision itself, in the Commission's comparison of the situation of public creditors to that of private creditors and, second, a lack of evidence to substantiate the Commission's conclusions regarding the situation of one of those private creditors and the prospects of Sniace's profitability and viability.

61 In so doing, the Court of First Instance remained within the parameters of the judicial review which the Community judicature can carry out in respect of complex economic assessments.

62 It follows from those considerations that the second ground of appeal is, in part, inadmissible and, in part, unfounded.

63 Since the Kingdom of Spain has been unsuccessful in all of the grounds of appeal put forward, the appeal must be dismissed.

Costs

64 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Lenzing has applied for the Kingdom of Spain to be ordered to pay the costs of this appeal and the latter has been unsuccessful, the Kingdom of Spain must be ordered to pay its own costs and those incurred by Lenzing.

65 Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Commission is to bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the Kingdom of Spain to pay its own costs and those incurred by Lenzing AG;**

3. **Orders the Commission of the European Communities to bear its own costs.**

[Signatures]